In The Matter Of:

UNITED STATES OF AMERICA, v DAVID ORTIZ,

May 13, 2013

SOUTHERN DISTRICT REPORTERS
500 PEARL STREET
NEW YORK, NY 10007
212 805-0330

Original File D5DTORTC.txt
Min-U-Script® with Word Index

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1 MR. GOMBINER: Judge, before we're relieved as 2 counsel, I want to put something on the record. And we have an 3 application to the Court, if that's possible.
4 THE COURT: Sure.
5 MR. GOMBINER: First, I just want to summarize a
6 little bit of now this doesn't
7 THE COURT: One second, just before you do it, one
8 matter I was going to raise was in a way technical, but maybe
9 not technical issue was whether the transcript of Friday could
10 be made available to Mr. Gordon, or whether that actually would
11 put you in a conflict position with your prior counsel, even
12 though I realize whatever is in there is now Brady material
13 that the government has to produce, it seems to me.
So just before you say anything, I thought I would
15 toss that idea.
MR. GOMBINER: Judge, anything we said at the conference on Friday or anything I say here is based exclusively on public records, either transcripts or documents that were filed in a court. We have not made any attempt to contact to get the file for Kevin Morrissey or to make any other inquiries in any way to try to learn anything connected with the Federal Defenders' prior representation of Mr. Morrissey, so I don't think there's any need. THE COURT: I just wanted to be sure because it was never a hundred percent clear to me that you had that
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6 Court ordered the government to make available the 3500

Good morning, your Honor.

9 LAW CLERK: Defense present and ready to proceed?

10 MR. GOMBINER: Yes, Mark Gombiner and Sarah

11 Baumgartel, Federal Defenders, for Mr. Ortiz.

12 THE COURT: Sit down, please.

MR. GOMBINER: Thank you. 13

THE COURT: As I think everybody is aware, on Friday 15 afternoon sometime after 6 o'clock we had a telephone 16 conference, and it was the, I think, considered judgment of all 17 counsel that Federal Defenders had a conflict of interest that 18 requires a change of counsel for Mr. Ortiz with respect to the

19 trial of this case that was supposed to commence this morning.

20 The CJA of the day was Mr. Gordon, and I was able to contact 21 him by phone after the conference and ascertained that he was

22 available to try this case on July 15, which I thought was a

23 reasonable gap in time to let new counsel prepare.

So I would think that the first order of business is 25 to appoint Mr. Gordon.

ously did 8 not know his name, although our client I think knew he was

9 talking to someone named Kevin, we didn't know who this person

10 was.

In any event, subsequent to that -- first it turns out 12 Mr. Morrissey used many, many, many different names, but that 13 was part of the 3500 material. But I was doing some -- in the 14 3500 material it indicated that Mr. Morrissey had been a paid 15 informant for the ATF since 2010, and that he previously had 16 been a witness in two cases in the Bronx. I think they referred to them as homicide prosecutions.

In any event, that struck me as kind of unusual that someone might be a witness in two different cases, and the government gave us the names of two cases. One, it turned out, 21 was not the actual true name of the case that Mr. Morrissey was 22 a witness in a case, defendant Felipe Figuerel, in fact the 23 defendant's name was Felipe Arroyo. In any event, based on 24 that, that struck me as someone who might be a little more --25 it's very unusual that any defendant would be a witness in two

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1 separate homicide cases unless he was a professional informant -- a jailhouse snitch or professional informant of some kind. And based on that, I went on Westlaw, put in 4 Mr. Morrissey's name, and found an unpublished opinion by Judge Oetken in which one of the defendants in one of the homicide cases, the Ricardo Jimenez case, had a pending 440 motion which one of the contentions is the state prosecutor failed to disclose Brady material about Mr. Morrissey.

And after that, I went on PACER, I pulled up the 9 documents, looked at the filings in the case before Judge Oetken, and found that there's a presently pending state court 440 proceeding in which the Office of the Federal Defender represents Mr. Jimenez. And I called the attorney for Mr. Jimenez and she said oh, yes, we have a lot of material on Mr. Morrissey, public records, and in any event, she provided those materials to me.

So what we learned, among other things, is that in 1992 Mr. Morrissey sent a letter to Judge Leo Glasser of the 18 Eastern District in which he announced that there was a person named Ray Sanchez living inside his body who was making him do all the bad and illegal things he was doing. He wrote some other letters to judges saying he was schizophrenic and taking 17 pills a day which caused him memory loss.

There were some psychiatric evaluations based on the 25 request of what was then the Federal Defenders. They filed a 1 been a cooperator for a long period of time, that most of his

- 2 cooperation has been with the federal government. He's
- 3 testified he was working with the FBI, the Secret Service, and
- 4 that he had a United States marshal named Craig Michael Kane
- 5 who was assigned as a personal handler. He also testified that
- 6 in fact he has supposedly received some information about
- 7 homicides in four separate cases, not just the government
- 8 saying two cases where he testified at trial, but at this
- 9 proceeding saying there were four separate cases in which he
- 10 supposedly acquired -- somebody confessed or he somehow 11 acquired information about homicides.

And it seems to me that none of this information was 13 reflected in what we got from the government. And in fact, 14 although one would think when they say he's been a confidential 15 informant for the ATF since 2010, which is when this case 16 started, that by implication - at least we initially read it that he wasn't an informant before that. 17

And putting aside the fact that this conflict wasn't 18 19 discovered, which was actually not that hard to realize there 20 was one because the docket sheet for his case said that he was 21 initially represented by a Community Defender organization, 22 which is the Federal Defender's Office, but putting that issue 23 to one side, I do think that the Court should undertake some 24 sort of inquiry of the prosecutors, the government in this

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1 motion for competency evaluation for Mr. Morrissey. There was 2 a report produced that Judge Sifton characterized as stating to 3 a medical certainty that Mr. Morrissey was a malingerer and faker and someone who lied for his advantage.

In that the same proceeding, the United States 5 Attorney's Office for Eastern District of New York sought an upward adjustment at sentencing on the grounds Mr. Morrissey 7 had obstructed justice by, among other things, threatening his wife and child with a gun to get them to change their story, that he lied about being the subject of threats by John Gotti, who had a trial pending at that time, in an effort to get transferred to another jail. And I think -- there were some other allegations, too, that they described as numerous instances of making false statements to advance his cause at sentencing. 15

Since that case, Mr. Morrissey has been, as was revealed by the very extensive rap sheet we have for him, has been committing crimes at a rather staggering rate, probably about 35 separate convictions, violations of supervised release. He was prosecuted by the United States Attorney's Office in 2000 here and the case was sent -- in this district. but then there was a Rule 20 to the Eastern District of New York. 23

In 2008, Mr. Morrissey, when he was testifying in one 25 of these homicide trials in the Bronx, testified that he has 1 witness. This is not - we're not talking about somebody who 2 is working for a little police department down in Georgia or

25 case, as to what steps they have taken to investigate their own

- 3 something, this guy, by his own testimony, has been working
- 4 extensively for the federal government for many years now and
- 5 seems to have been able to do that despite like a really pretty
- 6 amazing criminal record including getting arrested for drug
- 7 possession and pleading guilty during the very time that he was
- 8 working as a confidential informant on this case.
 - But it seems to me that there were definitely
- 10 enough -- even based on the very limited disclosures that we
- 11 received in the 3500 material, there were definitely enough red
- 12 flags there to make anyone who had any interest in actually
- 13 finding out who their witness was to take some further
- 14 investigation. And since this all has got to be in the
- 15 Department of Justice files, because they prosecuted him in
- 16 1992, the same information I'm talking about was I mean
- 17 they're the ones who moved for an upward adjustment for
- 18 obstruction of justice, they got these letters, and there's a
- 19 letter from Judge Glasser sending it to the prosecutor. So 20 it's not like they didn't have this information.

I know we have to get off this case, which I deeply 22 regret, but before we get off, I do think that the Court 23 should, even if it's in camera, in some way make some kind of 24 inquiry as to what is going on here. We're reading in the

25 Times, there's a front page story about how in Brooklyn there's

1 corroboration of what he says in his -- what the federal 2 defender says that he put in the transcript that he was also a 3 paid informant for the FBI and the Secret Service. We clearly

4 at this point, now that we have been made aware of that, we'll 5 look into it to learn more about that.

THE COURT: And was Mr. Morrissey acting in his role
as a paid informant for the ATF in the context of the case
before me?

MS. LONERGAN: Yes, your Honor, except for the very initial interaction between him and the defendant, which was he was not a paid informant at that point. But based on what he learned from that initial interaction, he reached out to people in law enforcement and became a paid informant with ATF.

THE COURT: Teach me, when ATF or another agency engages somebody as a paid informant, what kind of investigation do they do before they decide to utilize the

17 individual's services?

18 MS. LONERGAN: Your Honor, I know that they pull the confidential informant's criminal history. Beyond that, I can't speak for what ATF does.

THE COURT: And you knew that he had a marshal handler?

MS. LONERGAN: We didn't know - he was not referred to as a handler in our conversations. What we did learn was that after the initial interaction with the defendant in this

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And in fact, when you look at this individual's own sworn state trial testimony, he spells out a long record of

3 cooperation prior to that. And the government, even just by

4 the individual saying that he had a contact in the deputy5 marshal's service, which the government did not disclose that

6 they knew until just this moment, they should have at least

of they knew until just this moment, they should have at leas done some further inquiry to determine how he had that contact.

And your Honor, they didn't disclose his name, they

9 didn't disclose his connection with the Bronx detective who he
10 had reached out to. And so the disclosures that they made

11 painted a picture of a person who had never before cooperated.

12 They didn't even disclose that in his prior state trial

13 testimony that he was acting as a cooperator. From their notes

14 he could have just been an unlucky or lucky witness to two

15 murders. They didn't even specifically say that it was 16 pursuant to state cooperation. That really puts a different

17 slant on an individual's testimony and credibility, and it's

18 really very important disclosure material.

THE COURT: You didn't notice that it said that there was a competency hearing ordered?

21 MS. LONERGAN: No, your Honor.

THE COURT: Mr. Gombiner, you said that there's a case

23 currently before Judge Oetken, right?

24 MR. GOMBINER: Yes.

THE COURT: But you also said that there's currently a

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1 case he reached out to someone he knew in the Bronx, and when

2 he did not get a response from that person in the Bronx he3 reached out to someone that he knew at the marshal's Service.

THE COURT: There is someone by the name of Craig

Michael Kane?

6 MS. LONERGAN: I do not know. We know that he reached 7 out to a deputy U.S. marshal, and that the deputy U.S. marshal

8 is someone who ultimately put him in contact with the ATF.
9 MS. BAUMGARTEL: Your Honor, may I say, this is very
10 troubling; because what the government disclosed to us, the
11 very limited amount they disclosed is from one meeting they

12 have in their notes: Reached out to Bronx detective, another 13 contact, in touch with ATF. Now the government is saying they

14 did in fact know that he had a deputy marshal contact who he 15 was in touch with, but they didn't disclose that in even the

16 3500 material that they produced.

And if you look at, for example, the docket that we were just discussing, it references on there the Kevin Morrissey -- the informant's competency proceeding. So even

20 looking at the docket you should notice there's something 21 there. What we're concerned about is the 3500 that the

22 government produced presented a picture that this is an

23 individual whose first contact with law enforcement in terms of 24 cooperation was in November 2010 when allegedly he first had

25 this interaction with Mr. Ortiz.

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1 440 pending in state court?

2 MR. GOMBINER: Yeah.

THE COURT: They should not both be happening at the same time.

MR. GOMBINER: I'm not a total expert on this case, but I think Judge Oetken stayed the proceedings in the federal case to allow the 440 motion to be proceeding.

The defendant is pro se in federal court, and there was a lengthy, complex, procedural history here, but I think the end result is that case is stayed so the 440 motion could be --

THE COURT: I thought you said he was represented by

MR. GOMBINER: Appellate Defenders. That's in state to court, he's pro se in federal court.

Don't hold me -- I'm pretty sure that's right. It's Jimenez versus somebody. I could get the docket number. I

think, from my memory, it's 11 Civ. 6468
 MR. GORDON: Your Honor, may I have one moment with

20 Mr. Gombiner?

THE COURT: Sure.

22 (Pause)

MR. GORDON: Thank you, Judge.

THE COURT: So is the bottom line here that an

25 overwhelming percentage of what defense counsel has recited

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- 1 a detective who had a witness who seemed to come up with
- 2 testimony about one homicide case after another. This is how
- 3 miscarriages of justice occur when you have got a government
- 4 that doesn't seem to have any concern -- I don't want to be --
- 5 I'm not going to engage in any just based on the record
- 6 here, there does not seem to have been any effort at all to
- 7 check into the background of a witness who, even through the
- 8 very limited notes we had, is somebody who you would have to
- 9 think there might be something else up with this guy.
- That's something that I would think -- or if he lied
- 11 to them, that's probably Brady material, too. If they asked
- 12 him have you ever been an informant and he said no, that would
- 13 be a pretty substantial lie. That would be a crime for one
- 14 thing. It would be Brady material. And if they didn't ask
- 15 him, I mean that's pretty -- I think that's fairly extremely
- 16 negligent. So we're asking the Court to make some kind of 16
- 17 inquiry as to what happened.
- MS. BAUMGARTEL: Your Honor, I just want to add, so 18
- 19 it's a hundred percent clear, there were many things that
- 20 happened that were distant in time, but also some of this is
- 21 much more recent. So in the documents that we obtained, again
- 22 from public sources, he claimed as recently as November 2003 to
- 23 be mentally ill and incompetent. And his letters -- his 23 now call Federal Defenders was sort of the federal section of
- 24 testimony in these cases talking about his extensive federal
- 25 cooperation, that occurred in March 2008. And there are

- MS. LONERGAN: Your Honor, the representation on the 1 2 docket sheet of who he was represented by in the 1992 case had
- 3 the lawyer's name, who currently works at Dreier, and --
- THE COURT: Works where? 4
 - MS. LONERGAN: Dreier LLP, which is a Pennsylvania
- 6 firm.
- THE COURT: OK.
- MS. LONERGAN: And then underneath at the very bottom
- 9 in italics it said designation, Community Defenders. We did
- 10 not recognize that is the same organization as Federal
- 11 Defenders of New York. It didn't say Federal Defenders of New
- 12 York, it said Community Defenders. That is something now that
- 13 we're aware means Federal Defenders, but we did not know that
- 14 when we looked at that.
 - THE COURT: No one teaches you that?
- MS. LONERGAN: No. I have never been told if it says
- 17 Community Defenders that means Federal Defenders of New York.
 - THE COURT: You never read --
- MR. GOMBINER: Judge, it would say --
 - THE COURT: It's in our CJA plan. It's in the statute
- 21 involving representation of indigents in federal court. I mean
- 22 do they teach you, by the way, that it used to be that what we
- 24 the Legal Aid Society so that you would know if you saw Legal
- 25 Aid in this court it's them?

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- 1 records on file where he was sending letters to the United
- 2 States Attorney's Office and to his U.S. marshal, Craig Michael
- 3 Kane, as recently as 2006. So while many of these events --
- 4 while there's been a long pattern of this conduct dating back
- 5 many years, it's also important for the Court to see it's
- 6 continued even much more recently.
 - THE COURT: Before we get to this, the question that I
- 8 had was how did the U.S. Attorney's Office not figure out this
- 9 conflict at the beginning? Based on the rather simple notion
- 10 that someone prosecuted in federal court in the Southern
- 11 District, now I learned in the Eastern District -- that there
- 12 must be something like a 50 percent chance, 40 percent chance,
- 13 I don't know what exactly your percentage of representation is,
- 14 but it's enormous -- likely had Federal Defenders/Legal Aid as
- 15 their counsel.
- MR. GOMBINER: Judge, to be clear -- I think I was
- 17 clear, but we did not represent him in the Southern District
- case but in the Eastern District case.
- THE COURT: But this material is the Eastern District 19 20 case.
- MR. GOMBINER: Yes. 21
- THE COURT: I'm not an expert on reading these rap 22
- 23 sheets, but it doesn't take a genius to figure out that it's a
- federal case and it's you.
- So how did you guys not figure that out? 25

- - MS. LONERGAN: Yes, your Honor.
- THE COURT: That's good. And you never read -- after 3 you saw the docket sheet, you never went and read any of the
- 4 transcripts or other things that are referenced or got the
- 5 file, in which case presumably at some point the lawyer would
- 6 have said I'm so-and-so from Federal Defenders? Never read any 7 of that stuff? No?
- MS. LONERGAN: No, your Honor.
- THE COURT: Why not? You have a guy here who has the
- 10 longest rap sheet I have ever seen in any of the trials I have
- 11 had. I don't have the necessary the greatest lifetime
- 12 experience, but this is my 34th year on the bench here. And
- 13 don't you think it's your responsibility to learn everything
- 14 about your witness's criminal history so that, A, you can
- 15 evaluate whether you want to use him and trust him, and B, so
- 16 that you can be sure that you have given the defense everything
- that they're entitled to know? 17
- MS. SURRATT: It's true, your Honor, we did not pull 19 every transcript from every state and federal proceeding on his
- 20 rap sheet, which you noticed is lengthy.
- THE COURT: Do you now know that Mr. Morrissey was a 21 22 paid informant for at least one federal agency?
- MS. LONERGAN: Your Honor, we know that Mr. Morrissey 23 24 had contact with the United States marshal. We know that he
- 25 was a paid informant for the ATF. We do not have any

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1 this morning and I guess on Friday came as a surprise to the government?

- MS. LONERGAN: Yes, your Honor. 3
- THE COURT: Is Mr. Morrissey involved in all of the 4 transactions charged in this case?
- MS. LONERGAN: No, your Honor. 6
- THE COURT: How many? 7
- MS. LONERGAN: He is involved in three of the four. 8
- 9 In one of those three, the undercover officer -- the undercover
- 10 agent is also involved, and all four transactions are recorded. THE COURT: Is the evidence of the interaction between
- 11 12 Mr. Ortiz and Mr. Morrissey limited to the recordings or would
- 13 Mr. Morrissey be testifying about conversations that were not
- 14 recorded?
- MS. LONERGAN: About 90 percent of his testimony would
- 16 be about the recorded conversations, approximately ten
- 17 percent -- those percentages are not -- those are ballpark.
- 18 There are some conversations that he had with the defendant
- 19 that were not recorded. Some of those conversations are
- 20 corroborated in other ways because, for example, they came in
- 21 between two recorded conversations, so what Mr. Morrissey is
- 22 saying happened in the unrecorded conversation makes sense by
- 23 what happened before and what happened after that's recorded,
- 24 if that makes sense.
- MS. BAUMGARTEL: Your Honor, I would like to address

- 1 will have one story about why the price of that gun went up,
- 2 when the simple true account is simply my client didn't want to
- 3 sell it and so he offered to pay him more than double in order
- 4 to get him to sell it.

So there are going to be a lot of important components

- 6 of the trial that are not recorded and that go directly to our
- 7 defense and where Mr. Morrissey's credibility is going to be
- 8 important.

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THE COURT: Well, it seems to me the government has a 10 lot of work ahead of it to follow through on all the leads to 11 possible Brady and Giglio material that the defendant has 12 brought to your attention. Is there any reason why it should 13 take you more than two weeks to do that investigation?

MS. LONERGAN: Your Honor, we don't know how long that 15 investigation will take. We will start on it immediately, but 16 it will involve things such as getting records from the state 17 court, reaching out to see potentially this deputy U.S. 18 marshal. I think at this point we would want to do a thorough

19 investigation to look into what we have now learned, and I 20 don't want to put a time frame on that.

THE COURT: Well, I think there are two good reasons 22 to put a time frame on it. How about three. One, that you 23 didn't do it before, so therefore, if you are under a little 24 pressure, it's OK with me; two, the defendant should have known 25 about this, so there shouldn't be a delay; and three, you ought

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- 1 this. I mean there are a couple of points. One is that during 2 the period of time that we're talking about, my client was
- 3 working with Kevin Morrissey at a tow truck company, and so
- 4 they had interactions virtually every day. They had a lot of 5 conversations that were not recorded in any way.

I don't want -- I don't think that our defense is a 7 mystery, but I think that some very important aspects of this

- 8 trial will be instances that were not recorded, and I can name
- 9 a few. One is just how it starts, because Mr. Morrissey is
- 10 going to have one story about that, and our client's account
- 11 will be very different, and that's not something that is
- 12 recorded. That's something that Mr. Morrissey initiates that
- 13 begins well before he ever contacts anyone from the ATF. And
- 14 in a case like this where one of the jury instructions the
- 15 Court -- the government submitted to the Court is if Mr. Ortiz
- 16 held himself out, for example, as a firearms dealer, that will
- depend on Mr. Morrissey's testimony in large part.
- 18 Another thing that springs to mind, and we brought
- 19 this up in the last conference, on the recordings you can hear
- 20 my client saying to Mr. Morrissey the value his guns, one gun
- 21 is worth, he says, about 500. Days later the price that
- 22 Mr. Morrissey ends up paying for it is a thousand. That is
- 23 going to be a big point for the government. They want to call
- 24 an expert witness to talk about how that was above market as
- 25 evidence that my client was a firearms dealer. Mr. Morrissey

1 to learn a little bit more about your witness for your sake.

- I will give you until the end of the month. I don't
- 3 see any reason that you shouldn't work hard to do this. The
- other thing is that I think it would not be inappropriate for
- 5 the chief of the criminal division to send the Court an ex
- 6 parte letter explaining in a sense what went wrong and what is
- going to be done to make sure this doesn't happen again. At a
- 8 minimum, tremendous resources were invested by the Federal
- 9 Defenders, who are operating under a sequester, who don't have
- the time to work on cases in which they can't represent the 10
- 11 defendant. The work that the Court did is easily reasonable.
- 12 and what they did may in the end help Mr. Ortiz, but
- nonetheless, they're not in the position to use their time on
- 14 defendants who they're not able to represent. And I don't
- 15 really understand fully how it is that the U.S. Attorney's
- 16 Office failed to explore more closely the representation issue
- 17 of any witness who has been indicted in the Southern and
- 18 Eastern Districts of New York, because there ought to be a
- 19 presumption, almost, that their lawyers were the Federal
- 20 Defenders.
- And I think that what is clear is that with the wealth 22 of information that came out of the Eastern District case that, 23 had you done your homework in the first case, this whole
- 24 situation would never have arisen because you would have
- 25 learned about the competency exam and you would have learned

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1 about the remarks of the judges and you would have learned about the government's request for an upward adjustment, and I assume other things would have flowed from that.

So is there anything else before I officially appoint 4 Mr. Gordon?

MR. GOMBINER: No, Judge, thank you.

MS. BAUMGARTEL: Your Honor, as a housekeeping matter, we have a transportation order for the Court. I can hand it off to Mr. Gordon or hand it up.

MS. LONERGAN: Your Honor, if I may, earlier in asking 10 defense counsel about Friday's conference call, the Court referred to whether there was any Brady material in that conference call. I think that it's actually whether there was any Giglio material in that conference call, not Brady. THE COURT: OK. I'm not going to --

15 MS. BAUMGARTEL: Your Honor, I don't want to quibble, 16 but I mean the Supreme Court has made very clear that impeachment material is Brady material. That's what it is. The mechanism that requires the government to turn it over, and I will cite probably the easiest is Kyles v. Whitley, 514 U.S. 419, but Brady material is material that tends towards 21 impeachment. It's the same. Whatever precise language --THE COURT: Let's say that psychiatric report says 24 that Mr. Morrissey is incapable of telling the difference

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- 1 I would ask that you give them more time so they do a thorough
- 2 job and learn what they can about this guy. And if that means
- 3 the trial date would have to be changed -- it may not have to
- 4 be changed, but if it may have to be changed, we could deal

5 with that later.

THE COURT: I think that I have the confidence that, with a fire having been lit under the U.S. Attorney's Office,

- 8 that they will be able to contact essentially a whole bunch of
- 9 law enforcement agencies and courts to get this information. I
- 10 really don't see why, if they put their minds to it, that they
- 11 can't achieve it. Because we're talking about contacting ATF.
- 12 contacting the marshal's service, finding out if the witness
- ever worked for the FBI. They have got a list of their
- 14 informants or confidential sources. And as far as getting --15 he testified twice apparently, in the state court.

MR. GOMBINER: Yes.

THE COURT: And they were murder cases, so they 17 18 probably have transcripts. They're not like little cases which they never make the transcript.

MR. GOMBINER: They do have transcripts.

MR. GORDON: Obviously if the government decides that

22 they don't want to go to trial on a case that depends on a

23 witness like this and they want to nolle the case before July, we would have no objection.

THE COURT: That's one of the reasons I want them to

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25 between truth and fiction, you don't think that's Brady

- 1 material? Because if your case, as defense counsel argues, has
- 2 a substantial component of you've got to believe this witness,
- 3 and the witness has been medically examined and been found --
- 4 let's say he was found to be a pathological liar. I'm not sure
- 5 he was, but that report, which of course I have never seen, may
- 6 just be in a sense a statement that he was manipulating all the tests, consciously doing so. The way those psychological
- testing protocols work, you can tell whether someone is
- manipulating them, and that may be all it said. But
- 10 nonetheless, I certainly think I could come up, at least, with
 - a hypothetical where issues going to the witness's credibility
- rise to the level of Brady and aren't just simply ways to stick pins in the witness.

So one question. I'm going to appoint Mr. Gordon to 14 be Mr. Ortiz's counsel, but have you and Mr. Ortiz talked about whether he should stay here for another day to talk to you or should he go home? What are you planning on? Because simply before I sign this order I think that's a practical detail I'm 18 19 going to think about.

MR. GORDON: Your Honor, I know he wants to get home. 21 I could initially talk to him on the phone and then have him come back up again closer to trial.

But with respect to your asking the government to 24 investigate further with respect to the informant, if they 25 can't do it adequately and completely by the end of the month,

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- 1 work hard. I'm not telling them what to do, but that was the
- 2 import. The defendant needs to know, you need to know, and the
- 3 government needs to know. They have to make a decision,
- 4 because I take the assistants at their word that this comes as
- much as a surprise to them as it does to me, and so I'm
- 6 assuming that this was not part of the whole decision making
- 7 process. And I don't know whether it should change it. I
- 8 don't know what the evidence is. I don't know what's on tape.
- 9 I don't know what is -- how much of this is dependent on whether you believe Mr. Morrissey or not, I have no idea. 10

So they're in the best position to ask themselves the 12 theoretical question: If the jury decides that he is a total 13 liar and they don't wish to believe anything that he says

14 that's not corroborated, what would happen to their case? They 15 should obviously go through that thought process.

16 MR. GORDON: May I have one moment with Mr. Ortiz? THE COURT: Sure. 17

18 (Pause)

19 MR. GORDON: Mr. Ortiz would like to go home, and I 20 think I should get up to speed before my talks with him so I 21 could talk to him intelligently.

THE COURT: We only like intelligent conversations. 23 So I assume there's no objection to waiving the speedy

24 trial time until July 15.

MR. GORDON: No objection.

	ID UKIIZ,			May 13, 20
D5D	TORTC	Page 25		
1	THE COURT	F: OK. I have signed your transportation	*	
	order.		**	
3		GARTEL: Thank you.		
4	THE COURT	Γ: I think that's it for today.		
5		ON: Your Honor, will we have a conference	*	
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7		r: We'll do something.		
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HEALTH AND HOSPITAL CORPORATION

PRRECTIONAL HEALTH SERVICES

AFTER CARE LETTER

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SUPREME COURT OF THE STATE OF NEW YO COUNTY OF BRONX – PART	SEP 30 EUR
THE REODI E OF THE OTATE OF NEW YORK	
THE PEOPLE OF THE STATE OF NEW YORK,:	
:	AFFIRMATION OF
	PATRICK L. BRUNO
-against-	
:	
RICARDO JIMENEZ, :	Ind. 3825/2006
;	
Defendant. :	

PATRICK L. BRUNO, ESQ., an attorney duly admitted to practice in the State of New York, does hereby affirm under penalty of perjury that the following is true:

- I was appointed to represent Ricardo Jimenez on Indictment No.
 3825/2006. Mr. Jimenez was charged with second degree murder for a shooting that occurred in July of 1989. The case proceeded to trial and jury selection began on June 20, 2007.
- 2. As part of discovery, I requested that the prosecution provide me with the prior convictions and bad acts for any of their witnesses.
- 3. I received a one-page memo from Assistant District Attorney Lisa Mattaway, dated June 8, 2007, informing me of promises made to two incarcerated witnesses, Andrew O'Brien and Kevin Morrissey. Specifically, the memo stated

that Mr. O'Brien "[h]as asked for a letter to be prepared by the undersigned that he can have put in his file stating that he testified for the Bronx District Attorney's Office." As to Mr. Morrissey, the memo stated that he had pending cases in Nassau, Queens and Brooklyn, that prosecutors in Nassau and Brooklyn had apparently agreed to give him a sentence of one to three years, but the Queens prosecutor had not and that Mr. Morrissey "asked for a phone call to be made to Queens if he testified for the Bronx District Attorney's Office." I was not informed of any other promises made to these witnesses.

- 4. On June 20, 2007, the day jury selection began, I received from ADA Mattaway a one-page document listing convictions for prosecution witnesses

 Andrew O'Brien, Kevin Morrissey and Esco Blaylock. I was not informed of any other convictions or bad acts for these witnesses.
- 5. Due to the timing of these disclosures, which occurred as the trial was beginning, I did not conduct any independent investigation of criminal backgrounds of these three witnesses, nor did I request additional time to do so. In preparing my cross-examination of these witnesses, regarding their prior convictions, bad acts and promises made to them in exchange for their testimony, I relied solely on these disclosures.

6. Trial testimony began on June 28, 2007 and, after lengthy deliberations, the jury returned a guilty verdict on July 13, 2007.

Dated: September 1, 2011

PATRICK L. BRUNO, ESQ.

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF BRONX: CRIMINAL TERM

THE PEOPLE OF THE STATE OF NEW YORK Ex. Rel., RICARDO JIMENEZ a.k.a. - RICARDO SILLIE

Defendant,

-AGAINST-

THE PEOPLE OF THE STATE OF NEW YORK Plaintiffs,

NOTICE OF MOTION TO DISSMISS

Ind. # 3825/2006 Grand Jury # 44395/2006

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affirmation of RICARDO JIMENEZ, and upon all prior pleadings and proceedings had herein, the undersugned will move this court, in part 16 thereof, at 851 Grandconcourse, Bronx, New York 10451, on the 27th day of (44)2007, at 9:30 a.m. or as soon thereafter as counsel may be heard, for an order dismissing the indictment herein on the grounds that the defendant has been denied due process of law . under the NEW YORK STATE CONSTITUTION and the UNITED STATES CONS-TITUTION, by the lengthy and unjustifiable delay in commencing the prosecution herein, and granting such other and further relief as to the Court may seem just and proper.

Dated: April 12, 2007. Bronx, County

Defendant.

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF BRONX: CRIMINAL TERM

THE PEOPLE OF THE STATE OF NEW YORK Ex. Rel., RICARDO JIMENEZ a.k.a. - RICARDO SILLIE

Defendant,

-AGAINST-

THE PEOPLE OF THE STATE OF NEW YORK Plaintiffs,

AFFIRMATION
IN
SUPPORT OF
MOTION
TO
DISSMISS

Ind.# 3825/2006 Grand Jury # 44395/2006

- I, RICARDO JIMENEZ, duly sworn deposes and says:
- 1. That I am the defendant in the above captioned action.
- 2. That I make this affirmation in support of the within motion.
- 3. That under the instant indictment, the defendant JIMENEZ was charged with the crime of Murder in the second degree.
- 4. That the instant indictment is based upon an incident that occured on or about July 3, 1989, nearly eighteen years prior to the indictment herein, in the County of the Bronx in which the victim was shot and killed in the course of an altercation inside the Whitestone Cinema, 2505 Bruckner Boulevard, in Bronx County.
- 5. An examination of the records of this case reveals that RICARDO JIMENEZ, was arrested a couple of days after the incident and held 3-4 hours and then released, interestingly neither the police nor the prosecution followed-up on any interogation/information implicating JIMENEZ, despite the record indicating that July of 2001 the people claim that the defendant was again identified from multiple photo

array, then again in two (2) seperate occasions in 2006 witnesses claim to have identified JIMENEZ, as well as the first witness that prosecutors claim identified the defendant in 1989 after only being showed one single photo of defendant JIMENEZ, however despite all this that is reflected throughout the entire proceedings from the inception and the records of this case the people never showed any interest, nor followed up on any aspect of this case, it must be emphasized that at all critical stages concerning this incident defendant JIMENEZ, was either present in New York State Department of Corrections, or after being released in 1994, and his subsequent arrest (4) four months later for an unrelated offense in the State of New Jersey, and throughout his transfers to various facilities, all known to the prosecution, prior to being released and returning to New York City.

- 6. It is clearly evident that in addition to this lengthy delay in prosecuting the offense charged, the memories of the witnesses could possibly be dulled by the passage of time, and this in effect has caused actual prejudice to the defendant, inherently hindering and or impairing the ability of the defendant to adequately prepare and mount a defense against the allegations being made with regards to these proceedings.
- 7. Due to the lengthy delay in prosecuting defendant JIMENEZ is unreasonable and unjustified and has resulted in a violation of his right to Due Process of Law pursuant to the NEW YORK CONSTITUTION article 1 § 6, and the UNITED

STATES CONSTITUTIONAL AMENDMENT 14, and as such requires the dismissal of the present indictment see: People v.

Singer, 44 N.Y.2d 241, 405 N.Y.S.2d 2217(1978), People v.

Washington, 43 N.Y.2d 772, 401 N.Y.S.2d 1007(1977), People v.

Andine, 214 A.D.2d 373, 624 N.Y.S.2d 594 (1 Dept. 1995),

People v. Rodriguez, 205 A.D.2d 417, 613 N.Y.S.2d 398(1 Dept. 1994), People v. Allen, 13 A.D.2d 639, 789 N.Y.S.2d 56 (2nd Dept. 2004), People v. Morales, (N.Y. County 2006 Ind # 1721/2005).

- 8. By definition, the people have met the heaviest burden the law imposes- the burden of proof beyond a reasonable doubt. But aside from that, the passage of time takes a toil on Criminal cases. A re-trial of any matter, fifteen years after the fact, can never be wholly fair, witnesses memories can hardly be what they once were.
- 9. Some witnesses, have been contacted by individuals who have been contacted by individuals who have not hestitated to express a point of view; their communication and their questioning have not been nuetral, and the danger that witnesses, however since, have been tainted by such contacts is very real.
- 10. Furthermore, defendant JIMENEZ was never placed in a line-up during his arrest in July of 1989, and the people never persisted in not arresting JIMENEZ, and not placing JIMENEZ in a line-up, and not following up any leads in any way.
- 11. Failure to place JIMENEZ, in a line-up or to create a photo array negates any claim of a good faith investigation(s),

despite the fact that the description of JIMENEZ in 1989 warranted enough to compose a photo-array, line-up, or even seek an indictment at that time.

12. Moreover, eventhough their is no statute of limitations for the offense charged (Murder 2°) however where the prosecution knows of the whereabouts, they have to show good cause, and justification for the delay in commencing the proceedings against a defendant.

WHEREFORE, it is respectfully requested that the Court dismiss the indictment herein and grant such other and further relief as to the Court may seem just and proper.

Dated: April 13, 2007 Bronx, New York

RICARDO JIMENEZ

Defendant.

Sworn to me before this

12 day of Apri

2007.

NOTARY

PUBLIC

JOSEPH CORREA
Commissioner of Deeds
City of New York - No. 4-5401
Cert. Filed in Queens County
Commission Expires Dec. 29,

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF BRONX: CRIMINAL TERM	• ·
THE PEOPLE OF THE STATE OF NEW YORK, Ex. Rel., RICARDO JIMINEZ a.k.a RICARDO SILLIE,	
DEFENDANT	
- against -	AFFIDAVIT
	Indictment No. 3825/2006
THE PEOPLE OF THE STATE OF NEW YORK,	
PLAINTIFFS.	
X	
PATRICK L. BRUNO, an attorney at Law,	duly admitted to practice in the

State of New York, hereby affirms under penalty of perjury:

- 1. That I am the attorney of record having been assigned by the Appellate Division.
- 2. That this Affirmation is submitted in support of the Defendant's prayers for relief as enumerated in the annexed Notice of Motion.
- 3. That the statements made herein are true to your affiant's own knowledge, except as to those statements made upon information
- 4. That the sources of your affiant's information and belief are the Court records, the defense file, conversations with the Defendant and the Voluntary Disclosure Form submitted by the People.

- 5. That the defendant is charged in the indictment with the crime of Murder in the Second Degree and related crimes.
 - 6. I have adopted Defendant's Motion, which is submitted herein.

Dated: Floral Park, New York April 24, 2007

Respectfully submitted,

PATRICK/L. BRUNO

1	SUPREME COURT OF THE STATE OF NEW YORK
2	COUNTY OF BRONX: CRIMINAL TERM: PART M30
3	X
4	THE PEOPLE OF THE STATE OF NEW YORK : Indictment
5	: 3825-06 252311-06
6	-against- :
7	RICARDO JIMENEZ, :
8	Defendant. :
9	X
10	851 Grand Concourse Bronx, New York 10451
11	May 21, 2007
12	B E F O R E: HONORABLE WILLIAM MOGULESCU
13	BETOTAL.
14	APPEARANCES:
15	FOR THE PEOPLE:
16	ROBERT T. JOHNSON, ESQ.
17	District Attorney, Bronx County BY: LISA MATTAWAY, ESQ.
18	Assistant District Attorney
19	FOR THE DEFENDANT: PATRICK L. BRUNO, ESQ.
20	PAIRICK L. BRONO, LSQ.
21	
22	
23	
24	Marada Dilata Di
25	Maria Esther Rivera, RPR Senior Court Reporter

1		THE CLERK: This is number 35 and 40,
2		Ricardo Jimenez.
3		MR. BRUNO: Patrick L. Bruno, 99 Tulip
4		Avenue, Floral Park, New York, for Mr. Jimenez.
5	= _	Your Honor, I'm ready for trial.
6		MS. MATTAWAY: Lisa Mattaway, for the
7		Office of the District Attorney.
8		THE COURT: And?
9		MS. MATTAWAY: People are not ready
10	12	for trial.
11		THE COURT: Why?
12	73.4	MS. MATTAWAY: There are a number of
13		reasons. First, İ recently got off trial
14		myself. I was on a six-week trial in Part T-16.
15		Then I got off that trial about a week ago, and
16		I was ordered by Justice Bernstein to start a
17		three defendant 2005 in case and not to take
18		anything that would conflict with that.
19		This case is a late 2006. He was
20		arrested August 31, 2006.
21		THE COURT: In other words, he's only
22		been in jail for 10 months.
23		MR. BRUNO: It's a murder that
24		occurred 18 years ago.
25		THE COURT: But he's only been in jail

1	10 months.
2	MS. MATTAWAY: The three defendant
3	other case is a full year older than that.
4	THE COURT: I understand that. And
5	obviously those three defendants who have been
6	in jail for 20 months or 22 months should have a
7	trial. If your office doesn't have sufficient
8	people to try these cases within a reasonable
9	time period, they should hire more people or
10	consent to bail.
11	MS. MATTAWAY: Now that I'm off trial
12	with the case I just finished, I'm actively
13	working on getting this case to trial. I met
14	with a witness only a week ago. I'm meeting
15	with another witness tomorrow. The longer I
16	work with the case, the better.
17	THE COURT: If it's getting better,
18	somebody else should
19	MS. MATTAWAY: Do you want to call
20	Judge Bernstein?
21	THE COURT: When is that case
22	scheduled for?
23	MS. MATTAWAY: June 6th.
24	THE COURT: If you start the case
25	now

1	MS. MATTAWAY: There is no way that I
2	can start.
3	THE COURT: When can you start it?
4	MS. MATTAWAY: Well, Your Honor, how
5	about we put this case on for shortly after
6	this is a three defendant case. Now, I am
7	abiding by Justice Bernstein's order not to take
8	anything else. I don't know if defense would
9	agree to go forward or will be ready. If we can
10	put this on after that, then perhaps this will
11	be the next case that goes. He told me on the
12	2005 case
13	THE COURT: June 4th?
14	MS. MATTAWAY: Sorry, Judge?
15	THE COURT: June 4th?
16	MS. MATTAWAY: No. June 6th. That
17	case is on in M20. He told me don't take
18	anything between now and then. If this case
19	doesn't go, why don't we put it on for the
20	Monday after?
21	MR. BRUNO: It is not a personal
22	attack with this A.D.A., but on the last date,
23	May 14th, the message was she's ready, but for
24	the fact that one of the officers had a death in
25	his family and it wasn't a close relative, so we

1	postulated. For this reason we put it on a week
2	later. You know, now an entirely different
3.	issue that would drag this case out another
4	three weeks is being offered. I submit that we
5	try this case between now and June 6th.
6	THE COURT: When can you be ready?
7	MS. MATTAWAY: I actually think the
8	date I just gave the Court is probably a
9	reasonable date. I'm actually still speaking to
10	witnesses. There were several witnesses. It is
11	18 years old. I have to get a new medical
12	examiner to testify about the 18 year old
13	autopsy.
14	THE COURT: This is a gunshot wound.
15	You don't need the world's most foremost
16	MS. MATTAWAY: I need to lay
17	foundation, and I need to let the various agents
18	know. I need somebody who is working in 2007,
19	so I'm working
20	THE COURT: The People said they were
21	ready months ago.
22	MS. MATTAWAY: Yes, that's true.
23	THE COURT: If they were ready
24	eight months ago, this is what does this have
25	to do with anything? How could you have been

1	ready eight months ago?
2	MS. MATTAWAY: Because I am ready.
3	THE COURT: What are you proposing on
4	the way of bail?
5	MR. BRUNO: I would suggest \$10,000
6	bail. The family would have no hopes of making
7	much more than that.
8	THE COURT: I'm not prepared to do
9	\$10,000 bail.
10	MS. MATTAWAY: This defendant has 10
11	warrants from New York and New Jersey. He is
12	not any kind of bail risk. The People can be
13	ready in a very short time. He's only been in
14	since August 31st.
15	MR. BRUNO: Only?
16	THE COURT: Only in the Bronx, he has
17	only been in for 10 months and, oh, that's okay
18	another year or two that's not acceptable to
19	me. I will give you this adjournment. You will
20	find somebody else to try the case, if you try
21	that multiple defendant case. June 8th.
22	MR. BRUNO: May we set this for
23	June 6th? If the case doesn't go, we can start
24	this immediately.
25	THE COURT: June 8th.

1		THE DEFENDANT: Excuse me, Your Honor.
2	5	THE COURT: You have a lawyer, and,
3	Mr. Jimene	z, I'm not prepared at this moment to
4	set \$10,00	0 bail.
5	- I	MR. BRUNO: Your Honor, my client
6	submitted a	a pro se motion, which I adopted,
7	that's also	o about five weeks ago. May we have
8	some decis	ion so that doesn't become an
9	efficient	delay?
10		THE COURT: Let me see.
11		THE CLERK: (Handing.)
12		THE COURT: The motion to dismiss on
13	constituti	onal grounds is denied.
14	I	MR. BRUNO: Note my exception. We are
15	on for Jun	e 8th for trial.
16]	MS. MATTAWAY: Hearings and trial.
17]	MR. BRUNO: Could that be a date
18	certain, Y	our Honor?
19		THE COURT: I hope so.
20	1	MR. BRUNO: Are you setting any bail,
21	Your Honor	?
22		THE COURT: At the moment I'm not
23	setting ba	il. You said he can't make more than
24	\$10,000, a	nd I'm not prepared to set \$10,000.
25		MR. BRUNO: May we approach?

1	THE COURT: Yes.
2	(Whereupon, there is a discussion held
3	off the record.)
4	THE COURT: Mr. Jimenez, at this point
5	the bail will remain on remand status. We will
6	reevaluate this. I'm asking you and Mr. Bruno
7	to put together a maximum bail package that you
8	are able to get together. On the adjourn date
9	if the People are not prepared for trial, I will
10	reconsider your bail application and I will
11	reconsider it, but I am not prepared to do it
12	today. The People have said that within two
13	weeks or so Ms. Mattaway or somebody else will
14	be in a position to try this case.
15	MS. MATTAWAY: Yes. The misdemeanor
16	is tracking, Judge?
17	THE COURT: Yes.
18	* * * *
19	
20	Certified to be a true and accurate
21	transcript of the stenographic minutes taken
22	within.
23	Mo to
24	Maria Esther Rivera, RPR Senior Court Reporter
25	Sentor court vehorrer

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HOMICIDE-WASE # 840

FOLLOW UP # 18

He said that on the date, time and location, and at approximatel: 12:00 Mid., July 2, 1989, he went to get a soda at the concession stand after he had finished work. (he works the pop corn machine upstairs)

He saw two men arguing, one of them was Leon, a M/B/about 5' 10", 175 Lbs., high-top haircut with shaved sides, and two blond streaks running along the side of the head but not meeting in the back. Leon wore a white shirt, white shorts, black sneakers, (no socks) has a gold tooth on the upper right side of the mouth that can be taken off. Mr. Blaylock said that Leon looks Puerto Rican, and can mimick a Jamaican accent. Leon is a violent guy and heavily involved into selling drugs. He said that he has seen Leon engaged in fists fights in at least five occasions. He met Leon through a friend.

e. He has known Leon for about 2 years he said that Leon was arrested for possession of a rifle in February, 1989, on Boynton and Story Avenues. He said that Leon drove a Maxima-Grey, 1989, and before that, Leon drove a white beat-up car. He said that Leon had a girlfriend. Sharps, who had been reported missing by her mother about he

girlfriend, Sharon, who had been reported missing by her mother about 4 months ago.

Mr. Blaylock said that Leon got in front of the popcorn line and began to argue with another Black male. That Leon made fun of the other male's Jamaican accent. He said that Leon told the male that he was going to get his pistol, and that the victim said "go get your pistol". Leon then asked the victim to go outside, but instead, the victim got his food and went to the movies. Leon then went outside.

Mr. Blaylock then went into the movie playing Batman-theater #1. he stayed to the rear of the theater, standing. Ten minutes into the movie, he saw Leon walk in and he recognized him. Leon looked aroung, and recognizing the victim said, " are you the one with the popcorn ". He said the victim turned around but did not get up. Leon then stood up and continued to argue-the argument lasted for about three minutes. Mr. Blaylock said that he saw Leon take a gun out from his back and then firing a shot. The victim turned around and starts getting up while pulling a gun and pointing it at Leon. Leon then fires another shot hitting the victim in the forehead, and at the same time the victim's gun went off. Mr. Blaylock said that the victim fell on his stomach. Leon then ran out of the theater.

He said he went over to look at the victim; the victim had a big revolver; Leon had something like a pistol.

Mr. Blaylock said that Leon lived at 1057 Boynton Avenue, that he normally parked his car on Bronx River Avenue and Elder Avenue, that Leon corner was Boynto and Watson., and that Leon had had the gold streaks on his hair for about a year.

He said that the victim was darker than Leon.

Case active.

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RICARDO JIMENEZ,	*	: .		,
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Defendant.	5 %	:		
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STATE OF NEW YORK)		54		
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ROCKLAND COUNTY)				

LINDA SALTER, being duly sworn, under penalty of perjury hereby deposes and says:

- 1. In July, 1989, I was employed at the Whitestone Cinemas, located at 2505 Bruckner Boulevard, in the Bronx. I was working at the concession stand the night of July 3, 1989. That night, I saw an argument between two black men with Jamaican accents.
 - 2. In 1989, I was acquainted with Ricardo Jimenez.
- 3. I spoke to a detective in my home about two weeks after the shooting. I have reviewed the police report that is attached to this affidavit and it accurately describes what I told the detective about what I saw at the theater on July 3, 1989. As indicated in the report, I was shown a photo of Ricardo Jimenez and I told the

detective that Mr. Jimenez was not one of the men involved in the argument at the concession stand on July 3, 1989.

4. Until now, I have not been contacted by anyone representing Mr. Jimenez. If I had been asked to testify about what I saw at the theater on July 3, 1989, I would have been willing to do so.

LINDA SALTER

Sworn before me this 27 the day of October, 2011

NOTARY PUBLIC

KATHLEEN A. HOOD Notary Public, State of New York No. 02HO6006373 Qualified in Rockland County Commission Expires May 4, 20

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SUPREME COURT OF THE STATE OF NEW Y BRONX COUNTY: PART T23			
THE PEOPLE OF THE STATE OF NEW YORK		x :	
Respondent,	:	:	AFEIDAMIT
-against-		:	AFFIDAVIT Ind. No. 3825/06
RICARDO JIMENEZ,		:	
Defendant.	.:	:	
STATE OF PENNSYLVANIA) COUNTY OF MONROE)		X	

GREGORY JONES, being duly sworn, under penalty of perjury hereby deposes and says:

- 1. On July 3, 1989, I was the Chief of Security at the Whitestone Cinemas, located at 2505 Bruckner Boulevard, in the Bronx. I was employed by Aero Investigations and Security Services, the company that handled security at the theater. At that time, I was also working as a New York State Corrections Officer.
- 2. On July 3, 1989, I was at work at the Whitestone Cinemas. I was outside of the theater in a security vehicle. I received a radio report of shots fired inside Theater Number 1. I was joined by another security guard, Harold Hazely, and we went to the rear of the theater.

- 3. I saw a large number of people running out of the theater. Among those people was a black male who appeared to be in his 20s, dark complexion, approximately 5 feet 8 inches to 5 feet 10 inches tall, with a slim face. The man was dressed all in white. I noticed him because he had a gun in his hand. I saw the man get into a small car.
- 4. I went into Theater Number 1, where I saw the victim lying in the aisle. He head was facing down, toward the screen. Off-duty EMS workers were giving him CPR. An off-duty police officer had recovered a .38 caliber revolver from the victim and gave it to me. I removed four live rounds from the gun and I later gave it to a uniformed officer.
- 5. I spoke to the police after the shooting and told them what I saw. I was not contacted by anyone from the defense at any time prior to now. I would have been willing to testify about what I saw that night.

GREGORY JONES

Sworn before me this 09 day of February, 2012

COMMONWEALTH OF PENNSYLVANIA

NOTARIAL SEAL KIMBERLY PETTIGREW, NOTARY PUBLIC MT. POCONO BORO, MONROE CTY. MY COMMISSION EXPIRES SEPT. 06, 2015 SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART H92
-----X
THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION AND ORDER Ind. 2777/07

RAED AYYASH,	
	Defendant.
	X
WEBBER, J.	

Defendant is charged by indictment with Murder in the Second Degree (PL § 125.25[1]). By Notice of Motion dated February 19, 2008, defendant moves to dismiss the indictment on the grounds that the 19- year delay between the alleged commission of the crime in 1988 and defendant's re-arrest and indictment in 2007 violated his due process right to a prompt prosecution under New York State and United States Constitutions. Pursuant to defendant's motion, a *Singer* hearing was held before the court on August 10, 2011. The People called one witness, Detective Kevin Tracy. I find Detective Tracy credible and I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

In December 2005, Detective Kevin Tracy of the Bronx Homicide Task Force, was assigned the unsolved homicide of Hassan Abusalem as an apprehension case. In reviewing the file, Detective Tracy learned that on September 11, 1988, two males entered the location of 2040 Bronxdale Avenue, Apt. 4J in Bronx County. In the apartment were Hassan Abusalem and his wife, Brunilda Toro-Abusalem. Hassan Abusalem was shot and killed while his wife, Brunilda, was shot, but survived the attack. The case file indicated that Ms. Toro-Abusalem stated that she

and her husband, Hassan Abusalem, were inside their residence when at approximately at 12:30 a.m. the doorbell rang. Abusalem went to the door leaving Ms. Toro-Abusalem behind in the kitchen. An unidentified male entered the residence. Ms. Toro-Abusalem heard a commotion and a loud bang. When she looked, she saw her husband on the floor. The unidentified male chased her into the bedroom. She attempted to hide under the bed but the unidentified male shot her in the head. Ms. Toro-Abusalem suffered a graze wound to the head. Abusalem crawled into the hallway and fell in front of Apt. 4G. He suffered a gunshot wound to the chest as well as a severe laceration to his throat, and puncture wounds to his torso.

Following the shooting, Ms. Toro-Abusalem as well as a neighbor, Iaisheh Mustafa, spoke to the investigating detectives. According to Detective Tracy, the case file indicated that although the two witnesses were frightened and upset, both cooperated with the detectives. Ms. Toro-Abusalem gave several interviews to the police and gave a detailed description of the two men involved. She also identified Muhammad "Mike" Abuhweig as one of the individuals involved who was known to both her and her husband.

On September 13, 1988, Iaisheh Mustafa was shown a photographic array and identified the defendant, Ayyash, as one of the two individuals involved in the shooting. Based upon her identification, defendant, Ayyash, was arrested and placed in a line-up. On September 14, 1988, Ms. Mustafa viewed the line-up and again identified Ayyash.

Despite the eyewitness accounts and the identification by Ms. Mustafa, Assistant District Attorney Risa Sugarman, chief of the Bronx District Attorney's Homicide Bureau at the time, did not authorize the arrest of Ayyash and his arrest was voided. According to Detective Tracy's review of the case file, Assistant District Attorney Sugarman was apparently displeased that the

arresting detectives did not consult with her prior to making the arrest. She also appears to have been concerned that the eyewitnesses were scared or terrified and could not be counted on to cooperate in the future. Interestingly, on October 3, 1988, after ADA Sugarman's refusal to authorize the arrest, Ms. Toro-Abusalem also viewed a photographic array and identified Ayyash as having been involved in the shooting. No further action was taken as to the defendant or the codefendant, identified as "Mike" Abuhweig.

According to Detective Tracy, in 1997, there were some attempts to locate the witnesses as well as "Mike." These attempts were fruitless. Subsequently, in 1997, the case was transferred from the Apprehension Team to the Homicide Task Force. In 2005, when Detective Tracy took over the case, he made attempts to locate the witnesses, Ms. Toro-Abusalem and Ms. Mustafa. Ms. Toro-Abusalem was still living in New York, however, she was using a different name and was living at a different location. Ms. Mustafa was located in Jordan. Based on a license plate number as well as finger prints and a photograph for "Mike" Abuhweig, Detective Tracy was able to locate him under a different name, living in San Diego, California. Defendant Ayyash was also located in San Diego, where he was residing under his own name. Before arrangements could be made to arrange for "Mike's" return to New York, he returned to his home in Jordan. Attempts to "lure" him from Jordan to the Untied States and ultimately, to New York, were unsuccessful. According to Detective Tracy, no attempts were made to arrest Ayyash until "Mike" was arrested so as to not compromise the attempts to lure "Mike" back to the Untied States. Once it was determined that those attempts failed, Ayyash was arrested in California and extradited to New York on June 5, 2007. He was indicted on the instant charge on July 13, 2007. He was released on bail on July 22, 2008.

CONCLUSIONS OF LAW

As stated, defendant moves to dismiss the indictment on grounds that the delay between the alleged commission of the crime in 1988 and defendant's re-arrest and indictment in 2007 violated his due process right to a prompt prosecution under New York State and United States Constitutions. For the reasons stated below, defendant's motion is granted.

An unreasonable delay in prosecuting a defendant constitutes denial of due process of law (*People v Winfrey*, 20 NY 2d 138 [1967]; *People v Singer*, 44 NY2d 241 [1978]). In *Singer*, the Court of Appeals stated:

"Delay in bringing the defendant to trial after indictment or arrest is measured against Sixth Amendment speedy trial requirement which takes into account a number of factors, including actual or potential prejudice to the defendant's case through the loss of witnesses and the dulling of memory (citations omitted). Preindictment delay, on the other hand, is governed by the due process clause which generally requires a showing of actual prejudice before dismissal would be warranted (citations omitted) . . ."

Indeed, the Court of Appeals has long held that an "unreasonable delay in prosecuting a defendant constitutes a denial of due process of law" requiring dismissal of the charges (*People v Staley*, 41 NY2d 789 [1977]). In *People v Taranovich* (37 NY2d 442 [1975]), the Court of Appeals examined a defendant's right to a speedy trial under both the federal constitution as well as New York's speedy trial statute, CPL § 30.20. The Court held that in assessing a due process right to prompt prosecution, the analysis must be in substantially the same manner as the analysis of the right to speedy trial. In *Taranovich*, the Court established five factors to be considered in determining whether there has been a denial of defendant's right to a speedy trial, which are: (1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not

there is any indication that the defense has been impaired by reason of the delay (id).

Extent and Reason For Delay

It is well established that when there has been a protracted delay, the burden rests solely on the People to establish good cause for the delay (*Singer*, 44 NY2d at 254; *Staley*, 41 NY2d at 792; *see also Winfrey*, 20 NY2d 138; *People v Prosser*, 309 NY 353 [1955]). Delays caused by difficulty in amassing evidence sufficient to arrest, indict or prepare the prosecution do not deprive the defendant of due process of law, even if the delay may have caused some prejudice to the defense (*Singer*, 44 NY2d at 254; *Staley*, 41 NY2d at 792; *Winfrey*, 20 NY2d at 138). Similarly, delays due to difficulties in locating a suspect may be justified as well (*See Staley* at 792). Fundamental to the analysis is that "once a person stands accused of crime, he must be prosecuted promptly. Sheer neglect or trifling however, . . . is not permissible" (*id.*).

Here, the record does not indicate any good cause excusing the 19- year delay. The record does not indicate any basis for the delay in the prosecution other than the refusal by the chief of the Bronx District Attorney's Homicide Bureau to authorize the arrest in 1988. This however, does not explain or excuse the fact that no action was taken until 2005 which led to the defendant's ultimate arrest in 2007.

While Detective Tracy testified that Assistant District Attorney Sugarman believed that the witnesses would not cooperate in the future due to fear for their personal safety, this testimony was apparently based upon some vague notation in the case file reviewed by Detective Tracy. The original investigating detectives did not testify at the hearing. Nor, did Assistant District Attorney Sugarman. Thus the record is devoid of any clear indication of fear on the part of the witnesses.

There is also no indication that either witness was ever asked either by law enforcement or by

Assistant District Attorney Sugarman whether they would or would not be willing to testify. The record does show that both witnesses spoke to the investigating detectives on numerous occasions. Both viewed photographic arrays and line-ups following the incident. Ms. Toro-Abusalem also contacted law enforcement and gave information regarding the defendant as well as "Mike." Ms. Toro-Abusalem also "cooperated" with the police and viewed a photographic array of the defendant following the voiding of defendant's arrest.

The People's argument that the case required enhanced investigation is belied by the fact that the exact same information which was available and known to law enforcement in 2005 and 2007, was also known to them in 1988. In 2005, Detective Tracy, did nothing more than review the 1988 case folder, contact those same witnesses, obtain photographic identifications of the defendant from those witnesses and arrest the defendant. There were no additional witnesses located, nor was there any additional physical or forensic evidence found. The witnesses were available to law enforcement and to the prosecution in 1988 and 2005. The fact that there was no follow-up on the case from 1988 to 2005 appears to the court to be the result of "sheer neglect."

This Court would certainly agree that investigating and prosecuting agencies have a strong interest in conducting a complete and thorough investigation and are entitled to do so prior to arresting and charging a suspect. The need to investigate and obtain evidence is reasonable and legitimate, even if it may cause some prejudice to the defense (*People v Singer*, 44 NY2d at 254; *People v Vernace*, 96 NY2d 886 [2001]). Here, however, there is nothing to suggest that the delay was precipitated by anything other than inattention (*People v LeGrand*, 28 AD3d 318 [1st Dept 2006]).

Rather than a concern that the witnesses would not cooperate or a desire to conduct further

investigation, it appears that the case was not prosecuted in 1988 solely based upon Assistant District Attorney Sugarman's having felt "slighted" that she was not consulted prior to the defendant's arrest. This appears true given the lack of any conversation between Assistant District Attorney Sugarman and the witnesses regarding their willingness to cooperate. Additionally, there was no change in the People's position following the subsequent positive identification of the defendant by Ms. Toro-Abusalem¹.

The People argue that while the 19- year delay is certainly protracted, that fact alone does not require dismissal. The court agrees. It is not only the period of the delay, it is also the fact that no reasonable justification for the delay has been shown. The People cite three cases in support of their argument that defendant's motion should be denied. First, they cite *People v Vernace* (274 AD 2d 595 [2d Dept 2000]). In *Vernace*, the Court found a 17- year delay was reasonable where the witnesses were initially fearful of coming forward and their fears alleviated over the passage of time. *Vernace* involved a 1981 vicious double murder in a Queens bar, for which no one was prosecuted. Three individuals linked to organized crime were thought to be suspects. While 20 to 25 people allegedly were in the bar at the time of the murders, virtually all of them denied seeing the crime. Shortly after the murders, the main witness either fled the jurisdiction or hid from the police, refusing to cooperate. Another witness recanted her identification of one of the defendants, resulting in dismissal of the indictment against him. Another defendant was never located. In finding the delay reasonable, the Court noted that the record supported the conclusion that at the time of the incident, the witnesses were in fear of reprisal. However, that fear dissipated over the

¹It should be noted that it does not appear that defendant's 2005 arrest was pre-authorized by the Bronx District Attorney's Office.

years. As stated above, the record does not substantiate any such fear on the part of the witnesses.

The People also cite *People v Telese* (1 Misc. 3d 490 [County Ct, Nassau County 2003]). *Telese* involved an 18- year delay. In *Telese*, after some 18 years, law enforcement was able to match two latent thumb prints recovered from a homicide crime scene. In finding the delay reasonable, the court noted that prior to the matching of the latent thumb prints to those of defendant, the People lacked proof to connect the defendant to the commission of the murders. According to the court, the ultimate matching of the prints resulted from the upgrading of the computerized search systems over the 18-year time period. Again, here, as stated above, the same evidence available in 1988 was available and ultimately relied upon in 2005 and 2007.

Finally, the People cite *People v Denis* (276 AD2d 237 [3rd Dept 2000]). In *Denis*, the Court held a six (6) year delay was not unreasonable where a newly elected district attorney reviewed evidence available six (6) years prior and decided it was sufficient to proceed. In upholding the conviction, the Appellate Division, Third Department, noted that the record on appeal fully supported the conclusion that the delay was justified. Here, the record fails to support such a finding.

The Nature of the Charge

As stated above, the defendant is charged with Murder in the Second Degree (PL § 125.25 [1]), an extremely serious charge. The defendant is charged with acting with another in shooting two individuals, and killing one person. While, the Court is loathe to dismiss this charge, given the failure of the People to establish the reasonableness of the 19- year delay in this case, dismissal is warranted.

Pre-Trial Incarceration

Defendant was incarcerated from the date of his arrest on June 5, 2007 until bail was set

and he was released on that bail on June 22, 2008. While the People argue that this was not out of

the norm for the pre-trial incarceration of defendants, they concede that it is a substantial period of

time.

Impairment of Defense As a Result of the Delay

Where there is a finding of undue delay, a finding of actual prejudice to the defense is not

necessary (People v Taranovich, 37 NY2d at 447). Here, defendant does allege that given the

delay, the memories as well as the availability of witnesses who may have assisted the defendant

have been negatively affected.

The court, after having applied the *Taranovich* factors, finds that the delay has violated

defendant's constitutional right to speedy trial.

CONCLUSION

Defendant's motion to dismiss the indictment is granted.

The aforesaid constitutes the opinion, decision and order of the Court.

Dated: January 24, 2012

Bronx, N.Y.

Troy K. Webber J.S.C.